

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-12365

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

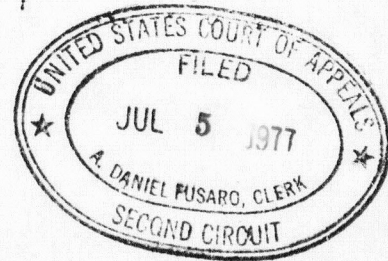
UNITED STATES OF AMERICA, APPELLEE

vs.

MICHAEL J. PETERS, APPELLANT

On Appeal from United States District Court
for the District of Vermont

BRIEF FOR THE APPELLANT



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X		
UNITED STATES OF AMERICA,	:	
Appellee	:	Docket No.
	:	
v.	:	77-1236
	:	
MICHAEL JEAN PETERS,	:	
Appellant	:	
-----X		

BRIEF FOR APPELLANT

PRELIMINARY STATEMENT

This appeal is from the jury conviction of March 1, 1977 of Michael J. Peters of Counts I, III, V, and VI of a four count indictment, Docket No. 76-76-4, United States District Court for the District of Vermont, Chief Judge James S. Holden presiding. This appeal is also from the orders entered by Chief Judge Holden denying Peters' motions for judgment of acquittal and for a new trial.

ISSUES FOR REVIEW

1. Did the District Court err in denying the defendant's Motion for Judgment of Acquittal at the close of the evidence.

2. Did the District Court err in denying defendant's Motions to set aside the jury verdicts of guilty as to Counts I, III, V and VI and to enter Judgment of Acquittal for defendant Peters.

3. Did the District Court err in denying defendant's Motion to set aside the jury verdicts of guilty as to Counts I, III, V and VI and to order a new trial.

STATEMENT OF THE CASE

A. Proceedings below:

By indictment dated December 16, 1976, Michael Jean Peters, 21 years of age, was indicted on four counts in Criminal No. 76-76-4 for the United States District Court, District of Vermont. Defendant Peters pled not guilty to each of the four counts.

Count I alleged that Peters, George Fitch and Edward Collins transported a stolen 1963 Cadillac in interstate commerce, knowing it to be stolen.

Count III alleged that Peters and George Fitch transported a stolen 1967 Austin Healy in interstate commerce knowing it to be stolen.

Count V alleged that Peters, George Fitch and Edward Collins transported a stolen 1966 Austin Healy in interstate commerce, knowing it to be stolen.

Counts I, III and V were alleged violations of Sec. 2312, 2, Title 18 United States Code.

Count V alleged that Peters, Fitch and Collins conspired to commit the foregoing offenses in violation of Sec. 2312, 2313, Title 18, United States Code.

No overt acts were alleged attributable to Peters. Peters and Edward Collins were tried together in trial by jury that took place on 23, 24 and 28 February 1977 and 1 March 1977, both Peters and Collins having pleaded not guilty to all counts. George Fitch was not tried, but was used in the trial as a Government witness. He had made prior arrangements with the Government to plead to one count with the understanding all other counts against him would be dropped. Peters' Motions for judgment of acquittal at the close of the Government's evidence and at the close of all the

evidence were denied. Verdicts of guilty were returned as to Counts III and V (transportation of stolen motor vehicle in interstate commerce) and as to Count VI (conspiracy).

Peters thereafter moved for a judgment of acquittal and in the alternative for a new trial as to all counts. The District Court, Honorable James S. Holden, Chief Judge, denied Peters' Motions.

By order dated and filed 27 April 1977 Peters was sentenced to be committed to the custody of the Attorney General for imprisonment for a period of one (1) year on Counts I, III, V, and VI. The sentence imposed on each of the four counts was ordered to run concurrent with one another.

Notice of appeal was filed by Michael Peters on 4 May 1977.

B. FACTS

On or about 23 July 1975 a 1963 Cadillac owned by Sidney Ives of Concord, Massachusetts was stolen. (Tr 76, 1-4) It was stolen from his garage. (Tr 80, 2-6) There was no testimony from Ives as

to who stole the vehicle. (Tr 75-81) This vehicle will be referred to hereafter as the Cadillac.

On or about 29 July 1975 a 1966 Green Austin Healy owned by Robert Leskie of 193 Marlboro Street, Boston, Massachusetts, was stolen (Tr 81, 20-22) from in front of his house. (Tr 83, 11-12) He had no knowledge of Peters. (Tr 85, 20-22) This vehicle will be referred to hereafter as the Green Austin Healy.

On or about 10 September 1975 a 1967 Black Austin Healy owned by Andrea Tavares of 285 Clarendon Street, Boston, Massachusetts was stolen. It had been parked outside her place. (Tr 86,87) She had no knowledge of Peters and had no idea who stole it. (Tr 88) Her husband testified as to its having been a gift to his wife and as to its value. (Tr 92-97) This vehicle will be referred to hereafter as the Black Austin Healy.

The Cadillac (Count I) was stolen by two acquaintances of Fitch. He paid \$50.00 for the theft and delivery of the vehicle to him. (Tr 110, lines 6-11) There was no evidence in the trial that Peters had any knowledge of or even the slightest

degree of participation in this theft. There is no evidence that Peters ever knew who stole the vehicle. Fitch testified that he obtained it for his own use. (Tr 110, 26-24) He alone registered it and drove it. (Tr 109, 23-25; Tr 111) He alone altered the identifying numbers for the purpose of concealing its true ownership. (Tr 111) Fitch had been driving this vehicle in Vermont in the Wilmington, Vermont area when he was questioned about it by Police Chief Pratt. At that time he gave Pratt a fictitious name and told him that the vehicle was owned by George Fitch. Collins was with Fitch but Peters was not. (Tr 245; Tr 334 and 335) The entire record is devoid of any evidence that Peters ever had any possession or control or use of the Cadillac. There is no evidence that Peters ever paid any money for it, or received any money for it. There is no evidence that it was ever sold. It was in Fitch's possession when it was recovered. It was as to this vehicle that Fitch pled guilty to the charge of transporting a stolen motor vehicle in interstate commerce as a

part of his plea bargaining. (Tr 98)

As to this vehicle the Government's case against Peters is entirely based upon the uncorroborated Fitch testimony which can be fairly summarized as follows:

Fitch testified that he at some point in Vermont told Peters and Collins that he had this stolen car which he had never showed them prior to being in Vermont. Fitch claimed he had come to Vermont in a truck with Peters and Collins in August.

(Tr 120) Collins testified that he and Peters drove to Vermont in July sometime after the 6th.

(Tr 307) Fitch claims that he went back to the Boston area and that he picked up the Cadillac.

He then claims he drove it to Vermont following Peters and Collins because he didn't know the way.

He was alone in the Cadillac. (Tr 125) He thereafter kept it for his own personal use. (Tr 126) There is no evidence that Peters ever used or transported this vehicle anywhere.

As to Count III Fitch testified he stole the

Green Austin Healy himself. (Tr 114) Fitch drove this vehicle back to Vermont, driving alone, but claiming he followed behind Peters and Collins again because he didn't know the way. (Tr 126-127) Fitch testified that he then in Vermont traded it to a person by the name of John Baruzzo for a motorcycle. (Tr 128) There is absolutely no evidence that Peters received or understood he would receive any money or any other consideration in this entire transaction. There is no evidence that he had any knowledge of or participation in the trade with Baruzzo. Fitch connects Peters to this matter only through his testimony that he was in the process of stealing the car when he discovered he needed a screwdriver. He says he went to an apartment in Boston and asked Peters and Collins for one and they gave him a butter-knife. (Tr 114) He then testified that Peters volunteered to "keep watch". (Tr 115) There is no evidence in the case that Peters ever drove or transported this vehicle anywhere. There is no evidence that he ever used, possessed, or controlled it in any way.

Finally, as to the Black Austin Healy (Count V) also stolen by Fitch, it was his testimony that he stole it because Collins wanted it and was willing to pay him for it. (Tr 129-130) Chief Pratt testified that Collins told him that he had bought the vehicle from Fitch and that he knew it had been stolen. (Tr 258) That Collins bought the car from Fitch was supported by the registration of the vehicle by Collins and the Bill of Sale. (Government Exhibits 18 and 22) They had been made out by Collins and Fitch on or about 11 September 1975. (Tr 335) (Tr 136) Peters was not present when Collins paid Fitch. (Tr 332 and 333) He didn't go to Montpelier, Vermont with Collins and Kotlorowski or Fitch to register the car. He did not discuss the purchase of the car with Fitch and Collins. (Tr 332) Again, there was no testimony that Peters ever possessed, used or controlled this vehicle. The only evidence associating Peters with this vehicle was again that of Fitch. He testified that Peters again stood watch while Fitch stole the car; that Peters drove to Vermont and

that he, Fitch, followed in the Black Austin Healy. He testified that as to this vehicle he and Peters had agreed to divide the proceeds of the sale to Collins and that he gave part of the money to Peters. (Tr 136) It is only as to this vehicle of the three vehicles in issue that Fitch claims he gave some money to Peters. Collins testified that Peters had nothing to do with any of the three vehicles. (Tr 335) Peters did not testify.

The other witnesses at the trial testified generally as follows:

Vt. State Trooper Roger Gilbert testified as to the circumstances surrounding the taking of Collins' statement by Chief Pratt. There was no material reference to Peters. (Tr 207-214)

George Paquette, Vt. Department of Motor Vehicles testified as to the motor vehicle registration. There was no material reference to Peters. (Tr 275-283)

Brattleboro, Vermont Police Officer Sherwood Lake testified only as to the recovery of the Green Austin Healy from Baruzzo. There was no reference

to Peters. (Tr 283-285)

John Lovejoy testified only as to the identity of the Green Austin Healy stolen from Robert Leslie. There was no reference to Peters. (Tr 286-288)

Charles Slate testified as to the value of the Black Austin Healy. (Tr 398-413)

Victor Blawfox testified that he had visited the apartment in Brattleboro, Vermont frequently and that Peters and Collins were living there, but that Fitch did not. He saw Fitch only twice. He did not implicate Peters. (Tr 414-426)

Milton Rockwell, a Vt. State Probation Officer, testified that he had a low opinion of Fitch for honesty and truthfulness and wouldn't trust him as far as he could throw him. (Tr 420)

James Griffin and Edward Collins, Sr. were character witnesses for the defendant Collins. (Tr 432-440)

The Government produced Robert Hughes as a character witness for Fitch. He testified that Fitch was a criminal and an informer and that he's dishonest because he is a thief. (Tr 443-444)

Phyllis Clifford, a girlfriend of Fitch, said she had seen Fitch together with Peters and Collins on several occasions. (Tr 449-456)

Such evidence as was presented by the Government in their case against Peters came solely from the testimony of Fitch essentially outlined above.

As to the credibility of Fitch it was shown through his own testimony that Fitch actually stole the three subject vehicles, that he had pled guilty of transporting the 1963 Cadillac in interstate commerce. (Tr 98) That he had pled guilty with the understanding that he would testify against Peters and Collins and the Government would drop four counts against him.

That he had had multiple prior felony convictions and arrests. (Tr 100 and Government Exhibits 8 through 17 - certified copies of convictions) That he went to Vermont because he was "wanted". (Tr 119) That he disliked Peters. (Tr 150) That he had stolen from Peters. (Tr 150) That he had lied in the past to obtain leniency. (Tr 161) That he had lied in the past to avoid going to jail. (Tr 161)

That he had recently lied to the Police to avoid arrest. (Tr 161)

Collins testified that Fitch had threatened and tried to kill him. (Tr 334) As stated above Probation Officer Rockwell testified he wouldn't trust Fitch as far as he could throw him and that he had a low opinion of Fitch's truthfulness and honesty. Also as stated above Hughes testified that Fitch was both a criminal and an informer.

Recalling Fitch's testimony to the effect that he had recently lied to the Police about other crimes and stolen goods to obtain his release (Tr 161), defendant Peters on re-cross of Collins (Tr 385) asked Collins if he had heard that testimony. He testified that he had. Collins was asked the following question:

"Did those lies to your own knowledge, relate

to the arrests that were effected upon you

and Mr. Peters on charges that were dismissed * *"

The Government objected as calling for hearsay, although Fitch was a co-defendant and present and the

Court sustained the objection. (Tr 385) Collins was asked, "And do you have information Mr. Collins, that a basis for that arrest was some false information given by Mr. Fitch". The Government made the same objection which the Court sustained. (Tr 384) Collins had testified on Direct that Peters had told him in New Hampshire that the police were looking to arrest them for something related to stolen cars. (Tr 375) On cross-examination of Collins by Peters it was brought out that the arrest threat was with regard to charges "unrelated to stolen motor vehicles" and that those charges (unspecified) had been dismissed. (Tr 384)

Subsequently it became apparent on cross-examination by the Government of Collins that it was going to attempt to bring out the nature of the above-mentioned dismissed charges. (Tr 393) Defense objections to the Government's line of questioning was overruled. (Tr 393-394) Objection was again stated by defense, and overruled. (Tr 395)

The Government then proceeded to elicit from Collins testimony as to miscellaneous items of stolen personal property alleged in State Charges against Peters and Collins that had all been dismissed. (Tr 396-397)

ARGUMENT

A. THE DISTRICT COURT ERRED IN DENYING PETERS' MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE EVIDENCE AND AFTER JURY VERDICT.

1. The evidence was not sufficient to allow the jury to conclude that Peters was guilty beyond a reasonable doubt of the offenses charged.

Such evidence as was presented by the Government in this case against Peters was entirely through the uncorroborated co-defendant testimony of Fitch, an alleged accomplice. It may be summarized fairly as follows:

a. A Cadillac was stolen for Fitch by persons other than Peters and Collins for his

personal use. No claim of agreement or participation as to the theft of this car was shown by the Government. A period of time after the theft Fitch claims he drove the car above to Vermont following behind Peters and Collins. He alone possessed and used this vehicle. Fitch claims Peters and Collins had knowledge after the fact that it was a stolen vehicle.

b. As to the Green Austin Healy and the Black Austin Healy, Fitch testified that he subsequently and on separate occasions stole both vehicles, but that Peters saw him steal them. He testified that he drove the stolen cars to Vermont, and that Peters and Collins drove ahead of him in another car that no one claims to have been stolen. There is no evidence as to whether Peters or Collins was a passenger. Fitch then traded the Green Austin Healy to a Mr. Baruzzo for a motorcycle which he retained for his own use. There is no evidence that Peters knew of this or had or anticipated any stake in the outcome. If one

accepts Fitch's testimony as credible we have only evidence that Peters watched the car being stolen and that he and Collins drove to Vermont ahead of Fitch while Fitch drove the stolen cars.

As to the Black Austin Healy that Fitch stole, he testified he stole it for Collins at Collins' request. He then transferred it to Collins for Collins' use. As to this car, however, as distinguished from the Cadillac and the Green Austin Healy, Fitch testified that he told Peters he would split the money. He testified that he (Fitch) got \$50.00 from Collins. Collins testified Peters had nothing to do with this.

c. As to the evidence generally related to the issue of the credibility of Fitch reference is hereby made to the statement of facts.

It is conceded that as a general proposition the Trial Court must be satisfied that viewing the evidence as a whole a reasonable mind might fairly conclude guilt beyond a reasonable doubt.

U.S. v. Taylor 464 F2d 240 (2d Cir 1972)

In this case the Government conceded that neither Peters nor Collins drove any of the cars described in the indictment. If guilt can be found at all it must necessarily be premised on "aiding and abetting". It is without dispute that Peters did not transport any of the vehicles. We contend that the evidence entirely fails to offer any support for the conclusion that Peters was either a co-conspirator or an aider and abettor. Even if it is assumed that Peters was in a vehicle (not stolen) that preceded Fitch from Massachusetts to Vermont there is no evidence as to whether he was a driver or a passenger. It is clear that he did not transport a stolen vehicle. Is the fact of being in an unstolen car that drove on ahead enough to establish "aiding and abetting". We think not. It is an inconceivable proposition to conclude that the act of Peters and Collins driving ahead, if that's what they did, was in any degree necessary or essential to Fitch's being successful in the commission of Fitch's admitted crimes.

This Court has held that in order to be an aider and abettor the defendant must associate himself with the venture in some fashion, "participate in it as something that he wishes to bring about or seek by his action to make it succeed". United States v. Johnson, 513 F.2d 819 (1975) The rule is similar with respect to establishing membership in a conspiracy. There must be some basis for inferring that Peters knew about the enterprise and intended to participate in it or make it succeed. He must make an affirmative attempt to further the purposes of the conspiracy. He must be shown to have promoted the venture himself, and have a stake in the outcome. Mere presence at the scene of a crime, even coupled with knowledge that at that moment a crime is being committed, is insufficient to prove aiding and abetting or membership in a conspiracy. Guilt may not be inferred from mere association with a guilty party. See United States v. Johnson, supra, 513 F2d at 823 and 824 and cases cited therein. It is without question that as to the Cadillac

described in Count I of the indictment Peters at most learned of its having been stolen long after it was stolen for Fitch, by persons unknown, and that he then put the vehicle to his own private and personal use. The record is devoid of Peters having any stake in the outcome. There was no evidence of any agreement, fixed or otherwise. The same can be said of the Green Austin Healy, although Fitch here asserted that Peters saw him steal it. Fitch then drove it to Vermont and traded it for a motorcycle. There was no showing of Peters having a stake in the outcome. Again there are the equivocal statements of Fitch that he followed Peters and Collins to Vermont. Whether Peters was a passenger or driver is not clear.

Fitch claims he stole the Black Austin Healy for Collins and that he paid Peters something for it. Collins who had no criminal record claimed he paid Fitch and that Peters had nothing to do with this transaction or any of the three cars. The essential point here is that Peters was not

being tried for being an accomplice to a theft or for receiving stolen property. He was being tried for conspiracy to transport the three subject vehicles in interstate commerce and for aiding and abetting in that transportation. Mere association with Fitch engaging in a criminal enterprise or even presence at the scene is not ordinarily enough. There must be some basis for inferring that Peters knew about the enterprise and intended to participate in it or to make it succeed. United States v. Cirilla, 499 F2d 822,883 (1974) From the fact that Peters may have been a passenger or a driver in a car that preceded Fitch to Vermont it would be difficult indeed to infer aiding and abetting or conspiracy on the facts of this case, and most unlikely that guilt beyond a reasonable doubt could be found by fair minds. This is so as to both Austin Healys and particularly so as to the Cadillac. Since Vermont was Peters home it was entirely reasonable for him to be going there and the fact that Fitch may have followed Peters and Collins does not make Peters a part of any conspiratorial design or

an aider and abettor in the transportation of stolen motor vehicles. One hypothesis is as good as another and mere suspicion is not enough.

The Government's entire case against Peters was based upon the uncorroborated testimony of Fitch. It is only by a wild stretch of the imagination that his testimony as to Peters is believable beyond a reasonable doubt is truthful. (See statement of facts related to Fitch's credibility, supra.) The act, in any event, of following Peters and Collins to Vermont was hardly an act necessary to the commission or completion of the alleged criminal activity of Fitch. It is fair to assume he was as a driver of the stolen cars quite capable of driving to Vermont or any other state for that matter, and finding his way. Were it otherwise then the question arises as to why not have had Peters or Collins drive or accompany Fitch in the stolen cars.

It may well be that Peters wishes he had never met Fitch, but the cases of Evans v. United States,

257 F2d 121 (9th Cir.) cert. denied, 358 U.S. 866 (1958), and Lee v. United States, 376 F2d 98 (9th Cir. 1967), point out that guilt may not be inferred from mere association with a guilty person. Association may and does breed suspicion, but such is not proof of criminal conduct.

The weight of the evidence was not sufficient to allow a jury to conclude Peters was guilty and does not substantiate the verdicts of guilty. Judgment of acquittal notwithstanding the jury verdicts should be entered.

B. THE DISTRICT COURT ERRED IN DENYING PETERS' MOTION TO SET ASIDE THE JURY VERDICTS OF GUILTY AS TO ALL COUNTS AND TO ORDER A NEW TRIAL.

1. As an alternative to reversing Peters' conviction and ordering a judgment of acquittal the argument above demonstrates that Peters should at least receive a new trial.

We know that all three cars were stolen by or for Pich. We know that he sold one Austin Healy to Collins and traded another to Mr. Baruzzo, and we know that he kept the Cadillac for himself.

Everyone agrees that he alone drove all three vehicles to Vermont. It does not appear anywhere in the evidence that Peters ever had even the slightest custody, possession or control of these vehicles. It is undisputed that Peters neither received nor anticipated any use or benefit from Fitch's stolen Cadillac. There is no evidence of any stake in it, directly or indirectly. The same is true of the Austin Healy that Fitch traded to Baruzzo. Fitch did testify that he gave a portion of the \$50.00 to Peters while in Vermont from Fitch's sale of the Black Austin Healy to Collins. The fact that Peters and Collins were followed by Fitch to Vermont may place Peters in the vicinity of Fitch while Fitch drove the stolen cars, but it is difficult to translate such presence into aiding and abetting and conspiracy. Peters' and Collins' presence in another vehicle is difficult to describe as being essential to Fitch's actual commission of the crime of transportation of the stolen vehicles in interstate commerce. Fitch's criminal acts were complete and without dependency

on the presence of Peters and Collins to succeed.

Peters should have been acquitted of the conspiracy and aiding and abetting counts as well. This Court, if it does not reverse the convictions and order judgment of acquittal for Peters, should at least order a new trial.

2. Evidence that Fitch had recently given false information to the police resulting in arrests of Peters and Collins was improperly excluded.

Fitch had testified that as recently as 1976 he had lied to police to prevent himself from going to jail. He testified that when asked by the police for information about other crimes and stolen goods he told them a lot of lies so that they would release him. He said that was his sole purpose.
(Tr 161)

On direct examination of Collins by his attorney Collins had testified that he had heard that the police were looking for him. He testified that Peters told him the arrests had something to do with the stolen motor vehicles. On cross-examination of

Collins by Peters he corrected this statement and said the arrest he was referring to related to a matter unconnected to stolen motor vehicles, and that those charges were dismissed. (Tr 384) Collins was then asked:

"Do you have information, Mr. Collins, that a basis for that arrest was some false information given by Mr. Fitch."

He answered: "Yes, sir".

The Government objected on the grounds of hearsay and the Court sustained the objection. (Tr 385) Further on (Tr 385) the question "Did those lies of your own knowledge relate to the arrests that were effected upon you and Mr. Peters on charges that were dismissed because they were * * " and the Government's objection to this question was again sustained on the ground of hearsay. (Tr 385)

As the record shows Fitch was present in Court the entire time. He was a co-defendant. The Government relied entirely upon his uncorroborated

testimony to convict Peters. Fitch was available and present for cross-examination, and the exclusion of this line of questioning in the cross-examination of Collins by Peters was without legal basis. The examination seemed well within the scope of Rule 611 Federal Rules of Evidence. To appellants knowledge there was nothing in this line of questioning that raises the hearsay rule. The objection of the Government was improperly sustained, thus precluding further cross-examination of Collins in an area heavily bearing on the credibility of Fitch. Given the fact of the Government's ultimate reliance upon Fitch's testimony to incriminate Peters in this case, the importance of showing that Fitch had recently attempted to incriminate Peters by deception is of great significance. Particularly so since those charges had been dismissed. If the testimony of Fitch was discredited the Government was entirely without a case against Peters.

Exclusion of this testimony was clearly prejudicial.

3. As indicated above Peters in cross-examination of Collins brought out that the police had been seeking to arrest Peters and Collins on matters unrelated to the trial and that those charges had been dismissed. (Tr 385) This limited cross-examination was solely to correct his earlier testimony on direct to the effect that the sought arrests related to stolen motor vehicles. Peters attempt to show that Fitch's lies had resulted in those unrelated arrests was excluded. (See point 2 above) On re-cross of Collins by the Government it became apparent that the Government was attempting to elicit from Collins testimony as to what the State charges were that Peters and Collins were arrested on in spite of the fact that it had been shown that they were unrelated to this case and that they had been dismissed. (Tr 393) Peters and Collins objected and the Court over-ruled the objection. (Tr 393-394) Objection to the Government's line of questions was further made on the ground that the witness had already testified that the charges had been dismissed and were not relevant to this

case. (Tr 395-396) The objections were over-ruled. Collins then proceeded to testify in response to the Government's question, "What were those charges that had been dismissed". He described a wide variety of allegedly stolen personal property. (Tr 396)

The Government's intent is clear. The Government in its questioning patently hoped to discredit the witness and Peters by the inferences raised in the eyes of the jury as to matters unequivocally shown to have been unrelated dismissed charges. The prejudice to Peters is compounded by the prior exclusion of examination on the subject of Fitch's involvement. It is a general proposition that it is improper to attempt impeachment of a witness by asking whether he has been arrested for or charged with a crime. United States v. Pennix, 313 F2d 524,529 (2d Cir. 1964) Although no case has been found on this precise point it would seem an even greater impropriety to permit detailed inquiry once it had been shown, as the Government well knew, that the charges had been dismissed. It

offends every sense of fair trial. It is plain that the details of the dismissed State charges was immaterial and irrelevant to the issues in the trial of Peters, and prejudicial to his case. Allowance of Government inquiry in this area is not consistent with the true interests of justice.

4. THE COURT OMITTED DEFENDANT'S REQUEST NOS. 10, 14 and 15.

These Requests of Peters ask the Court to instruct the jury to consider the testimony of Fitch with more than simple caution and care. (See defendant Peters' Requests 10, 14 and 15, Appellant's Appendix, Page 50) The Court charged in substance that the "testimony of an accomplice alone if believed by the jury may be of sufficient weight to sustain a verdict of guilty even though it is not corroborated in every detail by or supported by other evidence". The Court charged that such testimony however, "is always to be received with caution and considered with care". The Court further referred to Fitch as a Government informer and that as such his

testimony " * * * must be examined with care * * * and with greater care than the testimony of an ordinary witness * * *". The Court in its charge said "the government must frequently resort to the testimony of an accomplice or an informer who participated in a criminal offense, otherwise, it might be difficult if not impossible to detect and prosecute wrongdoers". (The Court's Charge, Appellant's Appendix, pages 23 and 24) While the Appellant Peters recognizes that the court's instruction to simply consider Fitch's testimony with care and caution may strictly adhere to the general rule prevailing for this circuit there are always exceptions. The Appellant believes this to be such a case. The Court's emphasis upon the Government's general need to use uncorroborated accomplice or informer testimony to detect, prosecute and convict wrongdoers placed a heavy burden upon the defendant when viewed together with the Court's denial of the requested charges. This is particularly so given the facts in this case related to the

Government's key witness, Fitch. It is undisputed that Fitch had stolen the three subject vehicles. He was a co-defendant and an alleged accomplice. He had pled guilty to transporting the subject 1963 Cadillac in interstate commerce. He had made a deal with the Government to testify with the understanding the Government would drop four counts. He had multiple felony convictions. He was in Vermont because he was wanted. He testified that he disliked Peters and Collins and that he had stolen from them. He testified that he had lied to obtain leniency and to avoid going to jail and to avoid arrest. A Vermont Probation Officer testified he had a low opinion of Fitch's truthfulness and honesty. Collins testified Fitch had threatened to kill him. Police Officer Hughes testified that Fitch was both a criminal and an informer. Accordingly, Mr. Fitch was not simply a liar or an informer, or a convicted felon or a co-defendant or an alleged accomplice or the source of uncorroborated testimony, he was all of those things and that is

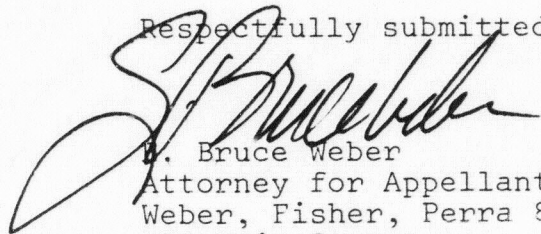
undisputed and the cumulative effect of all the subject Fitch's known activities and character and circumstances require in the interest of justice words of caution beyond the mere statement that it is "to be received with caution and considered with care". The aim of criminal justice is to see that the guilty are convicted and the innocent are not convicted. And it is basic to our system that guilty persons should go unpunished for lack of proper and sufficient evidence rather than an innocent person be convicted because of suspicious circumstances. Therefore, in a case such as this one, where Peters' guilt is to be determined solely on the credibility of Fitch, the Court should have instructed the jury as requested by Defendant in numbers 10, 14 and 15. Otherwise the "presumption of innocence" and the "burden of proof beyond a reasonable doubt" become mere slogans, receiving merely lip service.

A new trial should be ordered.

CONCLUSION

The judgment of the District Court should be reversed.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "J. Bruce Weber", is written over the typed name and address.

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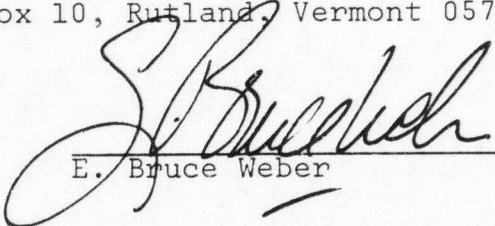
June 30, 1977

United States Court of Appeals
for the Second Circuit

United States of America,	:	
Appellee	:	
vs.	:	
Michael Jean Peters,	:	Docket No.
Appellant	:	77-1236

Certificate of Service

I do hereby certify that on the 30th day of June 1977 I made service of the Brief for the Appellant and Appendix for the Appellant upon the United States of America, appellee, by mailing two copies of the same to George W. F. Cook, United States Attorney for the District of Vermont, P.O. Box 10, Rutland, Vermont 05701.


E. Bruce Weber

